No. 11-1240

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

CBS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals in this case held that the Federal Communications Commission (FCC or Commission) had impermissibly penalized respondents for the broadcast of brief nudity "without supplying notice" that such material could be deemed indecent. Pet. App. 30a; cf. *id.* at 93a (Scirica, J., dissenting) ("CBS was adequately on notice" that "fleeting images could, depending on the context, be deemed indecent"). The respondents in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012) (*Fox II*), have asserted a fair-notice challenge to their liability for the broadcast of nudity that they likewise characterize as brief. Pet. 17. Because of the clear overlap between the two cases, the Court should hold this petition for *Fox II* and then dispose of

the petition as appropriate in light of its decision in that case.

1. Respondents characterize the government's request that its petition be held for *Fox II* as "inexplicable," and they contend that "*Fox II* is irrelevant to whether this petition should be granted because there is no overlap of issues." Br. in Opp. 1. Respondents are correct that the question presented in *Fox II* involves the constitutionality of the Commission's indecency enforcement policies under the First and Fifth Amendments, while the question presented here involves the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* As the government has explained (Pet. 17-18), however, the proper disposition of both cases may turn in part on whether FCC precedent provided adequate notice that the broadcast of brief nudity could be considered indecent. Like the Third Circuit's decision in this case, the fair-notice challenge in *Fox II* rests in part on the view that enforcement of the FCC's indecency regime against brief displays of nudity represents a departure from prior Commission practices. The two cases thus raise a significant common issue, even though the broadcasters in *Fox II* have asserted constitutional challenges while respondents have invoked the APA.

If the Court in *Fox II* rejects the broadcasters' fair-notice claim, its reasoning may undermine the court of appeals' conclusion in this case that the Commission had categorically exempted brief images of nudity from indecency enforcement. That possibility provides a sufficient basis for holding this petition. Respondents assert (Br. in Opp. 6 n.2) that the *Fox II* broadcasters' fair-notice claims "are unrelated to the APA issue in this case,"

but they offer no argument in support of that contention.*

2. As the petition for certiorari explains (at 14-17), the court of appeals' decision is irreconcilable with both Commission precedent and this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (*Fox I*). See generally Pet. App. 60a-93a (Scirica, J., dissenting). As a general matter, the FCC views brevity as a factor militating against a finding of indecency, but not as the basis for a categorical exemption. The one historical exception, under which the Commission previously treated brevity as the basis for a *per se* rule of non-indecency, was for cases involving non-literal expletives. Pet. 15-16; *Fox I*, 556 U.S. at 508. In the policy change upheld by this Court in *Fox I*, the Commission repudiated that "*per se*" exemption for brief expletives and stated that it would instead examine such broadcasts consistently with its "overall enforcement policy," *id.* at 518 (citation omitted), under which brevity was a relevant but not dispositive factor.

This reading of Commission precedent is not "revisionist history" (Br. in Opp. 8), nor was the *Fox I* Court's endorsement of it "dictum" (*id.* at 10). This ac-

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* This is not the first time that respondents have opposed a hold for *Fox* in this case. The government filed a petition for a writ of certiorari challenging the court of appeals' first decision in this case and asked the Court to hold the petition for the then-pending *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (*Fox I*). See Pet. 12. Respondents opposed that request, asking the Court to deny the petition and contending that the government's "claim of 'substantial overlap' between the Third Circuit's decision and [*Fox I*] falls far short of the mark." Br. in Opp. at 1, *FCC* v. *CBS Corp.*, 556 U.S. 1218 (2009) (No. 08-653). After its decision in *Fox I*, the Court granted the petition, vacated the court of appeals' decision, and remanded for further proceedings. See 556 U.S. 1218 (2009).

count instead was the basis for the Court's holding in *Fox I* that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," *i.e.*, that "[i]t was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent." 556 U.S. at 517. As the petition explains (at 16-17), rejection of a *per se* exemption for brief expletives could not have conformed the FCC's treatment of expletives to its overall indecency policy if the Commission had historically recognized a *per se* exemption for brief nudity.

Respondents contend that the Commission held in 1987 that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." Br. in Opp. 8 (purporting to quote *In re Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2705 (1987), but actually quoting *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987)). The full passage in which the quoted language appears, however, unambiguously supports the Commission's understanding of its prior precedent (endorsed by this Court in *Fox I*) as establishing a categorical exemption for brief material *only* in cases involving non-literal expletives:

> *If a complaint focuses solely on the use of expletives*, we believe that under the legal standards set forth in [*FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)], deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency. When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency. Rather, speech involving the description or depiction of sexual or excretory functions must be

> examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium.

In re Pacifica Found., Inc., 2 F.C.C.R. at 2699 ¶ 13 (emphasis added). The court of appeals' decision in this case is irreconcilable with that statement of Commission policy.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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